

Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. **77-662**

L. & J. PRESS CORPORATION,
Petitioner,

VS.

DAVID RADFORD MURPHY,
and

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT,
Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
EIGHTH CIRCUIT, AND ALTERNATIVE PETITION
FOR WRIT OF MANDAMUS**

ROBERT A. WULFF
JAMES J. AMELUNG
STEPHEN D. HOYNE
AMELUNG, WULFF & WILLENBROCK
722 Chestnut Street
16th Floor International Building
St. Louis, Missouri 63101
436-6757
Attorneys for Petitioner

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Respondents.**

**MOTION FOR LEAVE TO FILE PETITION FOR
WRIT OF CERTIORARI AND ALTERNATIVE
PETITION FOR WRIT OF MANDAMUS**

The petitioner moves the Court for leave to file the Petition for Writ of Certiorari and Alternative Petition for Writ of Mandamus, hereto annexed, and further moves that an order and rule be entered and issued directed to the Honorable United States Court of Appeals for the Eighth Circuit, and particularly Honorable Floyd R. Gibson, Chief Judge, calling up for review by certiorari the records of the United States Court of Appeals for the Eighth Circuit for review by this Court pursuant to 28 U.S.C. Section 1254 (1), or alternatively that an order and rule be entered and issued directing the Honorable United States Court of Appeals for the Eighth Circuit to show cause why a

writ of mandamus should not be issued against such Court of Appeals, in accordance with the prayer of said petition and why petitioner should not have such other and further relief in the premises as may be just and meet.

ROBERT A. WULFF

JAMES J. AMELUNG

STEPHEN D. HOYNE
AMELUNG, WULFF & WILLENBROCK
Attorneys for Petitioner
16th Floor International Building
722 Chestnut Street
St. Louis, Missouri 63101
436-6757

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OPINIONS BELOW

Judgment was entered in favor of petitioner by the U.S. District Court, Eastern District of Missouri without opinion upon a jury verdict in favor of defendant-petitioner.

On appeal the U.S. Court of Appeals for the Eighth Circuit reversed and remanded the cause for retrial. The opinion of the U.S. Court of Appeals is reported as *Murphy v. L & J Press Corp.*, 558 F.2d 407 (8th Cir. 1977).

STATEMENT OF JURISDICTION

Petitioner seeks review of the decision of the United States Court of Appeals for the Eighth Circuit by certiorari pursuant to 28 U.S.C. Section 1254 (1). The opinion of the United States Court of Appeals for the Eighth Circuit in the present controversy was filed June 16, 1977, and the Court of Appeals mandate was issued August 11, 1977. Petitioner's motion for rehearing or for rehearing and transfer to the Court en banc was denied August 15, 1977. Because the appeal in the United States Court of Appeals was heard and decided upon an incomplete record as the result of appellant, David Radford Murphy's, failure to make satisfactory arrangements for payment of costs of transcript in violation of Rule 10, (b), Federal Rules of Appellate Procedure, thereby denying petitioner its due process, and because petitioner's motion for rehearing upon complete record was denied, petitioner seeks invocation of this Court's superintending power to enforce the Federal Rules of Appellate Procedure through review by certiorari.

In the alternative, petitioner seeks relief by writ of mandamus to the United States Court of Appeals for the Eighth Circuit requiring rehearing on complete record as an exercise of this Court's power under 28 U.S.C. Section 1651, the All Writs Act.

QUESTIONS PRESENTED

1. Where the failure of appellant's counsel to make satisfactory arrangements with the U.S. District Court court reporter for payment of the cost of transcript in violation of Rule 10 (b) Federal Rules of Appellate Procedure resulted in the absence from the record on appeal of over 700 pages of trial transcript designated by petitioner as part of the original record to be

utilized on appeal pursuant to Rule 30 (f), Federal Rules of Appellate Procedure, which omission was hidden from detection by an erroneous minute entry on the docket sheet of the United States Court of Appeals, was petitioner denied due process?

2. Did the United States Court of Appeals act in excess of its jurisdiction in hearing this controversy and entering its decision on trial issues without the benefit of the complete record on appeal?
3. Did the United States Court of Appeals act in excess of jurisdiction in failing to vacate its decision and grant petitioner a rehearing upon discovery that its original consideration of trial issues was based upon a record devoid of trial proceedings?
4. Where the failure of appellant's counsel to make satisfactory arrangements with the United States District Court court reporter for payment of the cost of transcript in violation of Rule 10 (b), Federal Rules of Appellate Procedure resulted in the absence from the record on appeal of over 700 pages of trial transcript, designated by petitioner as part of the original record to be utilized on appeal pursuant to Rule 30 (f), Federal Rules of Appellate Procedure, which omission was hidden from detection by an erroneous minute entry on the docket sheet of the United States Court of Appeals, did the United States Court of Appeals act in excess of its jurisdiction in denying petitioner's motion to vacate opinion and dismiss the appeal?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES RELATING TO CONTROVERSY

Article III, Section 1, Constitution of the United States

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress

may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during Good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

28 U.S.C. Section 1254 (1).

Cases in the court of appeals may be reviewed by the Supreme Court by the following methods:

1. By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; * * *

28 U.S.C. Section 1651. Writs.

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

28 U.S.C. Section 2072. Rules of civil procedure.

The Supreme Court shall have the power to prescribe by general rule, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the court of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rule shall be of no further force and effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

Rule 10 (b), Federal Rules of Appellate Procedure.

(b) The Transcript of Proceedings; Duty of Appellant to Order; Notice to Appellee if Partial Transcript Is Ordered.

Within 10 days after filing the notice of appeal the appellant shall order from the reporter a transcript of such parts of the proceedings not already on file as he deems necessary for inclusion in the record. If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, he shall include in the record a transcript of all evidence relevant to such finding or conclusion. Unless the entire transcript is to be included, the appellant shall, within the time above provided, file and serve on the appellee a description of the parts of the transcript which he intends to include in the record and a statement of the issues he intends to present on the appeal. If the appellee deems a transcript of other parts of the proceedings to be necessary he shall, within 10 days after the service of the statement of the

appellant, file and serve on the appellant a designation of additional parts to be included. If the appellant shall refuse to order such parts, the appellee shall either order the parts or apply to the district court for an order requiring the appellant to do so. At the time of ordering, a party must make satisfactory arrangements with the reporter for payment of the cost of the transcript.

Rule 30(b), Federal Rules of Appellate Procedure.

(b) Determination of Contents of Appendix; Cost of Producing.

The parties are encouraged to agree as to the contents of the appendix. In the absence of agreement, the appellant shall, not later than 10 days after the date on which the record is filed, serve on the appellee a designation of the parts of the record which he intends to include in the appendix and a statement of the issues which he intends to present for review. If the appellee deems it necessary to direct the particular attention of the court to parts of the record not designated by the appellants, he shall, within 10 days after receipt of the designation, serve upon the appellant a designation of those parts. The appellant shall include in the appendix the parts thus designated. In designating parts of the record for inclusion in the appendix, the parties shall have regard for the fact that the entire record is always available to the court for reference and examination and shall not engage in unnecessary designation.

Unless the parties otherwise agree, the cost of producing the appendix shall initially be paid by the appellant, but if the appellant considers that parts of the record designated by the appellee for inclusion are unnecessary for the determination of the issues presented he may so advise the appellee and the appellee shall advance the costs of including such parts. The cost of producing the appendix shall be taxed as costs in the

case, but if either party shall cause matters to be included in the appendix unnecessarily the court may impose the cost of producing such parts on the party.

Rule 30(f), Federal Rules of Appellate Procedure.

(f) Hearing of Appeals on the Original Record Without the Necessity of an Appendix.

A court of appeals may by rule applicable to all cases, or to classes of cases, or by order in specific cases, dispense with the requirement of an appendix and permit appeals to be heard on the original record, with such copies of the record, or relevant part thereof, as the court may require.

Rule 11, A. (2), Rules of the United States Court of Appeals for the Eighth Circuit.

(2) In a case to be heard on original record, the portions of the original record, including both the clerk's record and the transcript of testimony, to be transmitted to the court of appeals by clerk of the district court are to be designated by the parties in accordance with the procedure set forth in Rule 30 (b) of the Federal Rules of Appellate Procedure for the determination of the contents of an appendix modified as follows. The appellant shall within 10 days of the filing of the notice of appeal file with the clerk of the district court and serve on the appellee his designation of the record and statement of issues. The appellee shall similarly file and serve his designation within 10 days of the receipt of the designation of the appellant. The appellant and the appellee shall designate only those portions of the original record and transcript of testimony necessary for a determination of the appeal. The clerk of the district court shall prepare and file with the clerk of the court of appeals the original and two copies of the original record, including the transcript of testimony, so designated. The cost of preparation of the two copies is to be taxed in accordance with Rule 39 (e) of F.R.A.P.

STATEMENT OF CASE

The present action was commenced by the filing of a petition in the Circuit Court for the City of St. Louis seeking damages in the amount of \$350,000.00 for alleged personal injuries caused by an alleged unreasonably dangerous and defective mechanical power press manufactured by defendant. The controversy was removed by defendant to the United States District Court for the Eastern District of Missouri, diversity of citizenship having existed between the parties, and subsequently plaintiff filed an amended complaint seeking damages in the amount of \$1,400,000.00 as compensatory damages and seeking punitive damages in the amount of \$5,000,000.00. After nine days of trial the jury returned a verdict in favor of defendant, L. & J. Press Corporation and the District Court, Honorable John F. Nangle, entered judgment for defendant.

Plaintiff-appellant filed notice of appeal pursuant to 28 U.S.C. Section 1292.

Counsel for plaintiff-appellant ordered a complete transcript of proceedings in a U.S. District Court from the court reporter. This is demonstrated by the affidavit of Olive L. Poole, court reporter for the U. S. District, Eastern District of Missouri, a copy of which is attached as an appendix to this petition, and the original of which was filed in the U.S. Court of Appeals for the Eighth Circuit. Plaintiff-appellant then filed his motion for appeal on the original record pursuant to Rule 11, Rules of the United States Court of Appeals for the Eighth Circuit and Rule 30 (f), Federal Rules of Appellate Procedure. The U.S. Court of Appeals granted plaintiff-appellant's motion. Thereafter plaintiff-appellant sought and obtained six separate extensions of time for filing brief and designation of record excusing appellant's delay on the ground that the transcript of trial proceedings had not yet been prepared. Designations of record by plaintiff-appellant Murphy and by petitioner were ultimately filed and

served. The designations of record by the parties included designation as a part of the record on appeal of over 700 pages of the transcript of trial proceedings.

As demonstrated by the minutes of the United States District Court for the Eastern District of Missouri, the U.S. District Clerk forwarded to the United States Court of Appeals for the Eighth Circuit on January 18, 1977, "original documents paged and indexed in triplicate, along with depositions". On January 21, 1977, the Clerk of the U.S. Court of Appeals for the Eighth Circuit, having apparently received those documents, made the following minute entry:

"Received original and 2 copies designated records: depositions of Mathias and Kemp."

As demonstrated by the affidavit of Court reporter Olive L. Poole, payment for the balance owed on fees for preparation of the transcript was not made, and the Court's copy of the transcript was not filed with the U.S. District Clerk, nor was a copy filed with the U.S. Court of Appeals for the Eighth Circuit.

Petitioner, relying on the minute entry of the U.S. Court of Appeals dated January 21, 1977, as quoted above, argued and submitted petitioner's case believing that the U.S. Court of Appeals for the Eighth Circuit would have the benefit of the substantial portions of the transcript designated by petitioner as a part of the record pursuant to Local Rule 11 of the Rules of the U.S. Court of Appeals for the Eighth Circuit and pursuant to Rule 30 (b) Federal Rules of Appellate Procedure.

The opinion of the U.S. Court of Appeals was filed June 16, 1977. The opinion filed misstated relief sought by plaintiff, misstated theories under which plaintiff sought relief, and misstated undisputed facts concerning the occurrence itself. Likewise, the opinion of the U.S. Court of Appeals contained a quotation of closing argument in the case which counsel for

petitioner recognized as having been taken from the brief of appellant, rather than from the transcript of proceedings, because the quotation included parenthetical notes as a part of the quotation which were not included in the trial transcript but which were added by plaintiff-appellant when the argument was quoted in the brief of appellant.

The obvious lack of background and knowledge of the facts of the case reflected in the opinion of the U.S. Court of Appeals, together with the quotation containing appellant's editorial comment as a part of the quotation, caused petitioner to suspect that the Court was deprived of the benefits of the over 700 pages of trial transcript in reaching its decision in this matter. Accordingly, counsel for petitioner appeared in the office of the Clerk of the United States Court of Appeals for the Eighth Circuit and requested to inspect a copy of the designated record distributed to members of the panel who had heard the case. Inspection of those copies revealed that the designated record included only 112 pages of pleadings and depositions, and totally omitted over 700 pages of transcript designated by the parties as a part of the original record on appeal. The record did include copies of the designation of record by both parties which clearly indicated that substantial portions of the 1193 page transcript were to have been included. However, not a single page of trial transcript was included in the documents forwarded by the U.S. District Clerk and filed by the Clerk of the U.S. Court of Appeals for the Eighth Circuit as "designated record".

Counsel for petitioner then contacted the Court reporter and, for the first time, learned that the trial transcript was not filed with the U. S. District Court or with the U. S. Court of Appeals for the Eighth Circuit because counsel for plaintiff-appellant had failed in his duty under Rule 10 (b), Federal Rules of Appellate Procedure, to make satisfactory arrangements for payment of the cost of the transcript. The reporter had delivered to counsel for petitioner a copy of the trial transcript for which

counsel of petitioner had made full payment. But, as demonstrated by the affidavit of Court reporter, Olive L. Poole, the transcript was not filed with the U. S. District Court, or with the U. S. Court of Appeals because payment of the fees for preparation of the transcript had not been completed by counsel for plaintiff-appellant.

Petitioner immediately obtained the affidavit of Court reporter, Olive L. Poole, along with the certified copies of the docket sheets of the U. S. District Court, Eastern District of Missouri and prepared and filed in the U. S. Court of Appeals for the Eighth Circuit Motion of Appellee to Withdraw Opinion and Dismiss Appeal, Motion of Appellee for a Rehearing or Transfer to the Court En Banc, or Alternative Motion to Modify Opinion to Conform to the Designated Record on Appeal, and suggestions in support thereof. Petitioner's Motion to Withdraw Opinion and Dismiss Appeal was denied August 1, 1977. The mandate of the Court of Appeals was issued August 11, 1977, the motion for rehearing was denied August 15, 1977.

Because, as a result of violations of the Federal Rules of Appellate Procedure and Rule 11 of the U. S. Court of Appeals for the Eighth Circuit, petitioner was deprived of the Court of Appeals' consideration of designated portions of the trial transcript, and because no further remedy is available from the United States Court of Appeals for the Eighth Circuit, petitioner now seeks redress from this Court to invoke its superintending powers to enforce petitioner's right to due process and a full and fair hearing of the appeal.

**STATEMENT OF ORIGINAL FEDERAL
JURISDICTION**

The original petition for relief was filed in behalf of plaintiff, a Missouri resident, against defendant, an Indiana corporation, seeking damages of \$350,000.00. Petitioner L. & J. Press Corporation filed its petition to remove pursuant to 28 U.S.C. Section 1441 on grounds of original Federal jurisdiction based upon diversity of citizenship, 28 U.S.C. Section 1332.

ARGUMENT

I. Petitioner Was Denied Due Process and Deprived of Its Right to a Hearing on the Full and Complete Record as Designated Pursuant to the Federal Rules of Appellate Procedure.

a. The appeal was heard and decided on an incomplete record which was totally devoid of the trial proceedings below.

The decision of the U. S. Court of Appeals for the Eighth Circuit was rendered upon a record on appeal which was totally devoid of any record of the trial proceedings below. The index to the designated record obtained by counsel for petitioner from the Clerk of the U. S. Court of Appeals for the Eighth Circuit following issuance of the Court's opinion clearly indicates that no portion of the trial transcript was included in the record. Likewise, the minutes of the U. S. Court of Appeals demonstrate that only exhibits and depositions were filed in addition to the "designated record". The affidavit of Court reporter, Olive L. Poole, demonstrates that the transcript of trial proceedings was neither filed with the U. S. District Court or with the U. S. Court of Appeals because counsel for appellant failed to complete payment of the cost of preparation of the transcript. In addition, counsel for petitioner, in an effort to further investigate this matter, conferred by telephone with the law clerk of Mr. Justice Clark, at the chambers of Mr. Justice Clark, and it was confirmed that no part of the trial transcript had been obtained for review or use in the preparation of the opinion in behalf of the Court of Appeals.

Petitioner included the affidavit and associated information in its Motion to Withdraw Opinion and Dismiss Appeal, in its Motion for Rehearing or Transfer to the Court En Banc, or Alternative Motion to Modify Opinion to Conform to the Designated

Record on Appeal, and in the suggestions in support thereof, all filed with the U.S. Court of Appeals for the Eighth Circuit. In his reply to these motions, plaintiff-appellant admitted that the transcript was not filed and was not available for use by the Court of Appeals. Further, the cost of the transcript was disallowed as costs by the U.S. District Court because the Court of Appeals decision was rendered "without benefit of a transcript." Therefore, it is established beyond question that the U.S. Court of Appeals for the Eighth Circuit did, in fact, hear the appeal and issue its opinion and mandate without the benefit of the complete record on appeal, and without those portions of the designated record recording the trial proceedings.

The records of the U.S. Court of Appeals establish that substantial portions of the trial transcript were properly designated and required to be included in the record on appeal. Plaintiff-appellant filed its motion to proceed on the original record pursuant to Rule 30 (f), Federal Rules of Appellate Procedure, and pursuant to Local Rule 11, Rules of the U.S. Court of Appeals for the Eighth Circuit, which motion was granted. Local Rule 11 required the designation by the parties of the portion of the clerk's record and transcript of testimony "necessary for a determination of the appeal," and further required that the clerk of the District Court prepare and file with the Clerk of the Court of Appeals the original and two copies of the original record "including the transcript of testimony so designated." The designation of record filed in behalf of petitioner was, itself, included as a part of the designated record actually forwarded to the U.S. Court of Appeals for the Eighth Circuit, and Petitioner's designation of record clearly listed over 700 pages of the trial transcript. Petitioner had previously reviewed the 1,193 pages of trial transcript to eliminate those portions unnecessary for a consideration of the issues on appeal. Because the designation of record prepared and filed by petitioner in the U.S. District Court was included as a part of the incomplete record forwarded to the Court of Appeals by the U.S. District

Court, the incomplete record on appeal showed, on its face, that over 700 pages of trial transcripts had been designated and obviously were not included in the 112 page record forwarded to the Court.

Therefore, there is no question that substantial portions of the trial transcript were properly designated and were required by the Federal Rules of Appellate Procedure and by the Local Rules of U.S. Court of Appeals for the Eighth Circuit to be included in the record on appeal. Likewise, there is no question that this portion of the designated record recording the trial proceedings of the case in the U.S. District Court was absent from the designated record, was unavailable for the Court's use in hearing the case, and was unavailable during the preparation by the Court of its opinion. Consequently, it is established as fact that this appeal was heard by the U.S. Court of Appeals on a deficient record.

B. The portion of the designated record omitted was essential to a fair hearing of the issues raised on appeal.

The index to the designated record, a copy of which was obtained by petitioner from the clerk's office of the U.S. Court of Appeals from a deputy clerk who had obtained the designated record from judicial chambers, indicates that the supposed designated record forwarded by the U.S. District Clerk contained only pleadings and docket entries. The minutes of the U. S. Court of Appeals for the Eighth Circuit indicates that depositions and trial exhibits were also filed in addition to the supposed "designated record." Those records further demonstrate that no part of the trial transcript was filed for use by the Court in its decision. The record as actually filed was totally devoid of any recording of the trial proceedings. Yet, the decision of the U.S. Court of Appeals reversed the judgment entered by the District Court on the grounds that trial tactics of petitioner and the District Court's rulings on evidence mislead the jury concerning the trial issues. The opinion of the Court of Appeals states:

"However, these questions, which lead to the *feasibility* of L. & J. providing proper guarding, were transformed into a question of '*who had the duty to guard?*' through L. & J.'s introduction of the ANSI and OSHA materials into evidence, statements concerning those materials during closing argument by L. & J.'s counsel and the perusal of the material by the jury during its deliberations" (558 F.2d 407, 411, emphasis as quoted).

Likewise, the actions of the trial court found to be error by the Court of Appeals were the introduction of ANSI and OSHA materials into evidence, the allowance of statements concerning those materials during closing argument by counsel and the allowance of those exhibits to go to the jury during its deliberation. Each of these events occurred during the trial of the case. But the portion of the designated record relating to the trial were absent from the record on appeal. The Court of Appeals had before it only copies of pleadings, depositions and exhibits, none of which related to the issues the U.S. Court of Appeals found determinative.

In the appeal petitioner argued that ANSI standards and OSHA regulations were a proper response to completely explain the standards and rebut an inference raised by plaintiff-appellant's own use of earlier additions of the ANSI standards in plaintiff-appellant's own case. Likewise, petitioner argued that the standards and regulations were admissible to demonstrate a consensus of opinion supporting the design decision of defendant to rebut evidence offered by plaintiff which recounted the history of press design throughout the world and back into the 19th century. Petitioner further argued that ANSI standards and OSHA regulations were admissible for use by the jury in determining the issues of culpability and malice injected into the case by plaintiff-appellant's prayer for punitive damages and plaintiff-appellant's evidence in support thereof. The Court of Appeals could not possibly have fairly considered these arguments with-

out a review of the portions of trial relating to the evidentiary issues involved. Yet the Court entered its decision on a record which excluded all recordings of the nine day trial proceeding.

The opinion of the Court of Appeals holds that trial court allowed the evidence to be unfairly utilized and unfairly argued. Throughout the trial, the trial court actively solicited the aid of counsel for plaintiff-appellant in suggesting a cautionary instruction advising the jury of the restricted use of the evidence of ANSI standards and OSHA regulations. On three separate occasions conferences on the record occurred outside the hearing of the jury regarding this request by the trial court and the relative positions of the parties on the evidence and the proper inferences of the evidence. Counsel for plaintiff by using the prior additions of ANSI standards was a proponent of the standards and was utilizing the standards to raise the inference that petitioner press manufacturer could feasibly guard a mechanical power press. However, counsel for plaintiff-appellant opposed the admission of other portions of the ANSI standard which clearly indicated that the guarding suggested by the ANSI standard could only feasibly be installed by press users, rather than the press manufacturer. The expert testimony presented in behalf of petitioner was testimony by the chairman of the committee which formulated the ANSI standards regarding the intent of those standards. Therefore, the position and intent of the parties with regard to the use of this evidence, and the testimony of witnesses concerning the meaning of the standards and how they related to the question of feasibility were extremely important considerations for review by the Court of Appeals in rendering its decision. Yet, the Court of Appeals in the present case entered its decision while in total ignorance of the trial proceedings regarding these matters.

The very minimal acquaintanceship of the Court with the trial issues and proceedings is obvious upon the face of the opinion. The opinion filed misstates the relief sought by the

plaintiff and the theories under which plaintiff sought such relief. The opinion misstates the facts of the occurrence itself, facts which plaintiff-appellant's expert and defendant-appellee-petitioner's expert agreed were a physical impossibility. The opinion considering the admissibility and argument of ANSI standards and OSHA regulations fails to consider the permissive use of this evidence in light of plaintiff's evidence and argument for punitive damages, and the opinion further failed to consider the plaintiff-appellant's own use of ANSI standards to raise the inference that the standards required the manufacturer to guard the machine. Likewise, the opinion failed to consider the trial court's several direct requests to counsel for plaintiff-appellant to prepare a cautionary instruction to advise the jury on the proper use of such evidence. Finally, the Court's opinion contains a quotation of counsel for petitioner's closing argument, which, on its face, demonstrates the unavailability to the Court of Appeals of the trial transcript because the quotation contains additional materials which were not a part of the trial transcript, but which counsel for plaintiff-appellant added to the transcript language when the quotation was set out in the brief of appellant before the Court of Appeals.

In summary, then, the opinion of the U. S. Court of Appeals turned on the trial court's decisions concerning trial issues. The Court of Appeals' opinion condemned the trial court for evidentiary decisions and found such decisions reversible error. Yet, the record before the Court of Appeals was totally barren of any recording of the trial proceedings, and the environment in which the trial court was called upon to reach its decision was entirely absent from the record, though those portions of the record were properly designated by petitioner as a part of the record on appeal. There can be no question that the U. S. Court of Appeals made its decision on the basis of issues of trial, though the Court of Appeals had no record of the trial before it.

C. Petitioner did nothing to waive its right to have the record considered by the Court; rather petitioner was deprived of the Court of Appeals' consideration of the full record on appeal as a result of the failure of opponent counsel to comply with his duties under the Federal Rules of Appellate Procedure, and this violation was hidden from detection by an erroneous entry on the docket sheet of the U. S. Court of Appeals for the Eighth Circuit.

The duty of counsel for plaintiff-appellant to order the transcript and to make "satisfactory arrangements with the reporter for payment of the cost of the transcript" is plainly stated in Rule 10(b), Federal Rules of Appellate Procedure. Counsel for petitioner received notice that opponent counsel had ordered the entire transcript. After the transcript was completed, counsel for petitioner received a copy of the transcript, for which petitioner made prompt payment to the Court reporter as requested. Petitioner complied with Rule 30(b), and Rule 30(f), Federal Rules of Appellate Procedure, to designate only those portions of the trial transcript which, in the judgment of counsel for petitioner, were necessary. Petitioner took extra care in making the designation, because the Court of Appeals had granted the request of plaintiff-appellant to hear the appeal on the original record, therefore, making it impossible for the Court of Appeals to go beyond the appendix to refer to the entire record as would be the case under other circumstances as outlined in Rule 30(b) which states:

"in designating parts of the record for inclusion in the appendix, the parties shall have regard for the fact that the entire record is always available to the Court for reference and examination and shall not engage in unnecessary designation."

Having made its designation of the portions of the transcript necessary for inclusion in the records to be used on appeal in lieu of appendix, petitioner presented its argument and sub-

mitted its case to the Court of Appeals suffering under the misapprehension that the trial transcript designated as a part of the record on appeal was available for the Court of Appeals and would be utilized by it in reaching its decision. Counsel for petitioner was further assured by the minute entry of the U. S. Court of Appeals indicating

"received original and 2 copies designated records;"

That statement, of course, was in error because over 700 pages of the trial transcript designated as a part of the record in petitioner's designation of record which, itself, was included in the documents actually filed with the Court of Appeals, was omitted. Only an examination of the copies of the designated record distributed to the Court of Appeals panel would have revealed to petitioner the absence of all trial proceedings from record.

In summary, then, petitioner did everything required by the Rules of Appellate Procedure and the Local Rules of U.S. Court of Appeals for the Eighth Circuit to invoke its right for inclusion in the record on appeal of those portions of the nine day trial proceedings petitioner believed to be "necessary" for review. Opponent counsel, on the other hand, failed in his duty to see that proper arrangements for payment of the transcript were made, and that the transcript was duly filed with the U.S. District Clerk so that portions designated as record could have been forwarded to the U.S. Court of Appeals. While petitioner did nothing to waive its right under the Federal Rules of Appellate Procedure to obtain a complete record necessary to the issues on appeal, petitioner was nevertheless deprived of that right as the result of opponent counsel's failure to comply with those same rules. The Court of Appeals, having failed to grant relief or rehearing, has determined that petitioner must suffer for the breach by opponent counsel of the Rules of Appellate Procedure. Therefore, the present controversy in the U. S. Court of Appeals for the Eighth Circuit has so far departed from the accepted and usual course of judicial proceedings and

has so far departed from the rights and duties set forth in the Federal Rules of Appellate Procedure, that only action by this Court can save petitioner from deprivation of its right to due process heretofore thrust upon it by the omissions and derelictions of opponent counsel.

II. Certiorari Should Issue So That This Court Can Exercise Its Superintending Power to Correct a Grave Departure From the Accepted and Usual Course of Judicial Proceeding by the U.S. Court of Appeals for the Eighth Circuit.

Petitioner seeks review by certiorari pursuant to 28 U.S.C. Section 1254 (1). Petitioner believes the circumstances shown by its petition demonstrate that the proceedings below have so far departed from the accepted and usual course of judicial proceedings, that assumption of jurisdiction by this Court to review the proceedings below is warranted. Therefore, pursuant to Rule 19 (b), Rules of the Supreme Court of the United States, petitioner believes the circumstances herein shown justify the exercise of the Court's judicial discretion in favor of issuing its writ of certiorari to the U.S. Court of Appeals for the Eighth Circuit.

Petitioner has been denied its right to due process by the failure of the U.S. Court of Appeals to require compliance with the Federal Rules of Appellate Procedure, and the failure of the U.S. Court of Appeals to rectify the burden cast upon petitioner by the noncompliance of opponent counsel with the Federal Rules of Appellate Procedure. The Rules of Appellate Procedure are, of course, established by the exercise of this Court's authority pursuant to 28 U.S.C. Section 2072. Likewise, this Court has held that certiorari will issue so that this Court can exercise its superintending power over the administration of those rules it has created. Thus in *La Buy v. Howes Leather Company*, 352 U.S. 249, 77 S. Ct. 309, 1 L.Ed.2d 290 (1957) this Court reviewed by certiorari a decision of the U.S. Court of

Appeals for the Seventh Circuit issuing its writ of mandamus to a U.S. District Judge who had referred matters pending before him in anti-trust litigation to a special master pursuant to Rule 53 (b), Federal Rules of Civil Procedure. There the Court of Appeals held that the U.S. District Court had acted in excess of its jurisdiction because the reference of the cases to the master was beyond the power of the trial judge under Rule 53 (b). There this Court noted the importance of that question to the administration of the Federal Rules of Civil Procedure lead to the grant of a writ of certiorari to review the matter. (352 U.S. 249, 251, 77 S. Ct. 309, 311). Likewise, in *Schlagenhauf v. Holzer*, 379 U.S. 104, 85 S. Ct. 234, 13 L.Ed.2d 152 (1964) this Court again granted certiorari to review the decision of the U.S. Court of Appeals for the Seventh Circuit on a question involving an order of physical examination pursuant to Rule 35 (a), Federal Rules of Civil Procedure. In that opinion the importance of this Court's responsibility to formulate necessary guidelines and to enforce the rules of practice established by the Court was noted:

"However, in this instance the issue concerns the construction and application of the Federal Rules of Civil Procedure. It is thus appropriate for us to determine on the merits the issues presented and to formulate the necessary guide lines in this area. See *Van Dusen v. Barrack*, 376 U.S. 612, 84 S.Ct. 805, 11 L. Ed2d 945. As this Court stated in *Los Angeles Brush Mfg. Corporation v. James*, 272 U.S. 701, 706, 47 S.Ct. 286, 288, 71 L. Ed. 481:

'[W]e think it clear that where the subject concerns the enforcement of the * * * rules which by law it is the duty of this Court to formulate and put in force * * * it may * * * deal directly with the District Court * * *.' (379 U.S. 104, 112, 85 S. Ct. 234, 239).

The present controversy involves the application and enforcement of the Federal Rules of Appellate Procedure, also formulated by this Court, and the enforcement of those rules also merits direct action. Thus, where the rights of a litigant, which the rules were designed to protect, have been violated by a failure in the court of appeals to enforce the Federal Rules of Appellate Procedure, the Supreme Court should exercise its superintending power to enforce the rules it has promulgated by granting certiorari to review the actions of the U.S. Court of Appeals.

III. Mandamus Should Issue to Prevent the Court of Appeals From Acting in Excess of Its Jurisdiction by Allowing Its Decision, Founded on a Deficient Record, to Stand Without a Reconsideration of the Case on a Full and Complete Record as Designated by the Parties.

Petitioner has, in the alternative, petitioned this Court for writ of mandamus directed to the U.S. Court of Appeals for the Eighth Circuit requiring a vacation of its opinion and mandate previously entered, and granting rehearing or other appropriate relief. Petitioner seeks to invoke the power of this Court pursuant to 28 U.S.C. Section 1651, the All Writs Act. Petitioner contends that mandamus is the appropriate remedy, and the only remedy remaining available to rectify the deprivation cast upon petitioner by the failure of the U.S. Court of Appeals to enforce the Federal Rules of Appellate Procedure.

In the proceedings below, immediately upon learning that the transcript of trial proceedings had been omitted from the record on appeal, petitioner filed its Motion to Withdraw Opinion and Dismiss Appeal, and its Motion for a Rehearing or Transfer to the Court En Banc or Alternative Motion to Modify Opinion to Conform to the Designated Record on Appeal. Those motions have been denied by the U.S. Court of Appeals, Eighth Circuit. Therefore, petitioner has no other remedy re-

maining available. Likewise, in the absence of relief from this Court petitioner will have been deprived of its right to have the appeal heard on the complete record designated pursuant to the Federal Rules of Appellate Procedure. This Court has held that mandamus will issue in those circumstances to enforce a rule promulgated by this Court. In *La Buy v. Howes Leather Company*, 352 U.S. 256, 77 S.Ct. 309, 1 L.Ed.2d 290 (1956), previously cited, this Court stated:

"The exceptional circumstances here warrant the use of the extraordinary remedy of mandamus. See *State of Maryland v. Soper*, 1926, 270 U.S. 9, 30, 46 S.Ct. 185, 187, 87 L.Ed. 449. As this Court pointed out in *Los Angeles Mfg. Corp. v. James*, 1927, 272 U.S. 701, 706, 47 S.Ct. 286, 288, 71 L.Ed. 481: '* * * [W]here the subject concerns the enforcement of the * * * [r]ules which by law it is the duty of this court to formulate and put in force,' mandamus should issue to prevent such action thereunder so palpably improper as to place it beyond the scope of the rule invoked. As was said there at page 707 of 272 U.S., at page 289 of 47 S.Ct., where the Court '* * * to find that the rules have been practically nullified by a District Judge * * * it would not hesitate to restrain [him] * * *.' (352 U.S. 249, 256, 77 S.Ct. 309, 313).

Likewise, in *Schlagenhauf v. Holder*, 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964), this Court approved the remedy of mandamus from the U.S. Court of Appeals to the U.S. District Court to enforce an application of the Federal Rules of Civil Procedure, though in that case the action of the trial judge was found proper and no usurpation of judicial power was found to require actual issuance of mandamus.

In the present controversy, then, mandamus is an appropriate remedy, and the only remaining remedy. The circumstances

demonstrate that the Court of Appeals for the Eighth Circuit heard the present controversy on a record totally devoid of any recording of the trial proceedings, though over 700 pages of trial transcript were designated by petitioner as part of the record pursuant to the Federal Rules of Appellate Procedure. Likewise, the Court of Appeals reversed the decision of the U.S. District Court finding error in the handling of trial issues on the part of the trial court, without ever having examined the transcript to be informed of the actual proceedings in which the Court of Appeals found error. The Court of Appeals has further refused to rehear the appeal on a full and complete record or to grant any other relief whatsoever. Under these circumstances petitioner's right to have the Court of Appeals consider necessary portions the recorded trial proceeding as that right is established in the Federal Rules of Appellate Procedure has been deprived. The orders of the U.S. Court of Appeals for the Eighth Circuit denying petitioner's Motion to Withdraw Opinion and Dismiss Appeal, and denying petitioner's Motion for Rehearing or Transfer to the Court En Banc, or alternative motion to modify opinion to conform to the designated record on appeal are in excess of its jurisdiction, and the entry of opinion and mandate of the U.S. Court of Appeals for the Eighth Circuit without ever having reviewed the recorded trial proceedings properly designated as a part of the record is a usurpation of judicial power. Therefore, justice requires that this Court issue its writ of mandamus to the U.S. Court of Appeals for the Eighth Circuit requiring that Court to withdraw its opinion and mandate previously entered and requiring a further hearing by that Court on the full record as designated pursuant to the Federal Rules of Appellate Procedure.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that this Court grant its writ of certiorari directed to the U.S. Court of Appeals for the Eighth Circuit calling up for review the records of that Court and the opinion and mandate of that Court reversing the judgment of the U.S. District Court, without ever having reviewed the record on appeal properly designated pursuant to the Federal Rules of Appellate Procedure.

In the alternative, petitioner respectfully prays that this Court issue its writ of mandamus to the United States Court of Appeals for the Eighth Circuit requiring that Court to show cause why its opinion and mandate should not be vacated, and further requiring that Court to show cause why the Motion of Appellee to Withdraw Opinion and Dismiss Appeal and the Motion of Appellee for Rehearing or Transfer to the Court En Banc, or Alternative Motion to Modify Opinion to Conform to the Designated Record on Appeal previously filed in the U.S. Court of Appeals for the Eighth Circuit should not be granted.

ROBERT A. WULFF

JAMES J. AMELUNG

**STEPHEN D. HOYNE
AMELUNG, WULFF &
WILLENBROCK**

Attorneys for Petitioner
16th Floor International Building
722 Chestnut Street
St. Louis, Missouri 63101
436-6757

APPENDIX

APPENDIX A

United States Court of Appeals
For the Eighth Circuit

—
No. 76-1092
—

David Radford Murphy,
Plaintiff-Appellant,
v.
L & J Press Corporation,
Defendant-Appellee.

Appeal from the
United States Dis-
trict Court for the
Eastern District of
Missouri.

—
Submitted: February 14, 1977
Filed: June 16, 1977
—

Before Clark, Associate Justice,* Heaney and Webster, Circuit
Judges.

—
Mr. Justice Clark.

This action was filed by appellant David Radford Murphy
in the Circuit Court of the City of St. Louis against appellee
L & J Press Corporation (L & J) for personal injuries sustained
while operating a punch press manufactured by the latter.
L & J removed the action to the United States District Court

*Associate Justice Tom C. Clark, United States Supreme Court
(Ret.), sitting by designation.

for the Eastern District of Missouri on diversity grounds pursuant to 28 U.S.C. § 1441(a).

Murphy's complaint alleged that: (1) on strict liability principles he had suffered \$1,400,000 damages as the result of the amputation of four fingers of his right hand while operating a punch press manufactured by L & J; (2) he had suffered \$5,000,000 damages for the failure of L & J to provide a guard at the point of operation which would have prevented his injuries; and (3) that L & J failed to post any warning of the danger so that Murphy might know of its imminence.

The case was tried to the jury on the strict liability theory, after which the jury found for L & J, awarding Murphy nothing. The District Court entered judgment accordingly, and Murphy has appealed, briefing some fifteen claims of error and listing fifteen "other errors" for this court's consideration. We have carefully reviewed each of the claims and agree with Murphy that the case must be reversed and remanded for a new trial for reasons we will set forth below.

I

Murphy had worked for the Hart Manufacturing Company (Hart)¹ for some two weeks prior to being assigned to the punch press. He was given a cursory explanation of the press operation and had been using it for only two hours when his injury occurred.

The press itself was an open back, inclinable, multifunctional mechanical clutch press of 60-ton rating. It was designed for automatic, semi-automatic or manual operation. L & J neither supplied a guard at the point of operation nor attached any kind of cautionary notice to the press warning of the danger to the operator when used without a point of operation guard.

¹ Hart is not a party to this action.

The function of the press is to supply power in bringing two halves of a die together.² The top half of the die is attached to the ram of the press, while the lower half is attached to the base plate. When the clutch is activated, the ram descends with 60 tons of force bringing the two die halves into contact, thereby shaping the metal stock between them. The ram then ascends to its original position and when, as here, it is set for a single stroke, it remains raised until the operator again activates the clutch.

On May 1, 1972, Murphy was manually feeding the press, placing a blank piece of metal stock in the space between the two halves of the die with his hand. He was also manually extracting the formed metal by lifting it from the space between the die halves with his hand. He had not been schooled in the inherent dangers of the press nor warned thereof; neither was he furnished any tongs to place and remove the metal stock when ready, although testimony indicates he was aware his hand could be severed if it was caught under the ram. Some two hours into the shift, Murphy was reaching for the piece of metal on the die when the ram came down and hit his hand, went all the way back up, came half way down again, shook, and went back up. The four fingers of his right hand were severed, leaving only his thumb and two short stubs.

II

Missouri follows the strict liability provisions of § 402A of the *Restatement of Torts 2d* as adopted in *Keener v. Dayton Electric Manufacturing Co.*, 445 S.W.2d 362 (Mo. 1969), and it was within these parameters that Murphy brought his action.

The parties quickly agreed upon a number of points, including the following: (1) that the safety of the operator was maintained by manually depressing a foot pedal on the press; (2)

² No dies were furnished with the press.

that the press was highly dangerous without a guard preventing the operator's hands from entering the point of operation (the area between the die halves); (3) that proper guarding would insure complete safety, indeed that Murphy's injuries would not have occurred had the press been properly guarded; and (4) that the universal custom of the punch press industry has been to rely solely upon the purchaser and user of the machine to supply the guarding either by making his own guards, hiring another company to make the guards, or purchasing pre-fabricated guards from other sources.

With the parties in agreement on these points, the evidence presented at trial focused on two basic issues: was it feasible for L & J to provide a guard at the point of operation; and, if not feasible, did L & J have a duty to warn users of the dangers of the press?

Murphy's evidence consisted primarily of the expert testimony of one expert witness who had examined the press and found three design defects: (1) the lack of a point of operation guard or other protective device to keep one's hands from entering the ram area during the descent of the ram; (2) no provision for protective control of the foot pedal; and (3) failure to provide adequate warning signs or instructional information to the operator. Murphy also called the jury's attention to point of operation guards illustrated in the 1948 and 1960 American National Standards Institute (ANSI) B-11 codes as a means of showing the types of guards available at the time the press was manufactured in 1950.

L & J's case also relied heavily on expert testimony, most of which centered around two propositions. The first was that by placing an adjustable point of operation guard on the machine when manufactured, the functions of the press would be unduly limited in the dies which could be attached, thereby restricting the number of press operations. The second was that the press, as manufactured, was not dangerous and did not

become so until a method of feeding as well as dies were added by the purchaser or user. Further testimony indicated that 95% of L & J's presses are sold through dealers, as was this one, and that L & J has no contact whatever with the ultimate press user in those instances.

Over Murphy's objection, counsel for L & J was allowed to introduce the 1971 ANSI code as well as Occupational Safety and Health Act (OSHA) regulation 1910.217 into evidence. The former placed the duty to guard the point of operation on the purchaser or user of the machine, and the latter, which was admittedly modeled after the ANSI code, placed the duty to guard on the purchaser or user as well. During closing argument, counsel for L & J took the ANSI code and OSHA regulations and made the following statements:

... I'm going to lay right here in the table [counsel laid 1971 ANSI B11.1 and OSHA Regulation 1910.217 on the counsel table closest to the jury] my evidence on who—who has the responsibility of guarding at the point of operation, and this is for you to determine what the preponderance of the evidence is. Just because this book says so don't mean you have to find that way. See? So, you use that as evidence. And I will ask you to wait and watch what Mr. Igoe puts on the table as evidence . . .

So, now, we have the '71 standards, OSHA is just getting off the ground. God love our government, we don't want anything different, and we know that in our democratic processes things take a little time, we've got to get our house in order, we've got to set up committees, we've got to set up reinforcing agencies, but one thing has been done, and this you may rest assured, we now have on the statute books from our United States Congress's law that says, "Mr. Dudley, you're right, and what you have been doing throughout your years we're now going to back you up and we're going to put the power of the United

States Government and the power of the United States District Court behind you, and we are going to do something about it, and they have done something about it in the form of a statute, part of which reads:

“It shall be the responsibility of the employer to provide and ensure the usage of point-of-operation guards or properly applied and adjusted point-of-operation devices on every operation performed on a mechanical press.”

And I submit to you, ladies and gentlemen of the jury, that you heard what I had to say from the statute. We know why the Congress is concerned, and they set it forth in their Act, Public Law 91-596, which I read to you during the case, and it starts off by saying what they are going to do to encourage employers and employees in their efforts to reduce the number of occupational and safety health hazards. They go on further, and I'm not going to read all of the inbetween, but you have heard the important point, and you also heard that Section 5 talks about the employer furnishing the employee a safe place to work, and, by gum, if he don't do it, he's going to be hauled before this court and he's going to be fined up to \$10,000 for each violation.

Following closing arguments, the jury retired to deliberate. Some six and one-half hours later, they asked for copies of the ANSI and OSHA materials, which the trial court allowed over Murphy's objection. A short time later, the jury returned a verdict against Murphy.

III

The *Restatement of Torts 2d* § 402A provides in pertinent part:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his

property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

- (a) the seller is engaged in the business of selling such a product, and
- (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it was sold.

There is no dispute as to L & J's status as a seller,³ nor is there any claim that the press was not in substantially the same condition as when manufactured at the time Murphy sustained his injuries. Thus it would follow that L & J is liable to Murphy if the press constituted a “defective condition unreasonably dangerous” to Murphy.

It is well settled law in Missouri that failure to provide a safety factor in a machine's design (here a point of operation guard or some other protective device) can constitute a “defective condition,” *Keener, supra; Higgins v. Paul Hardeman, Inc.*, 457 S.W.2d 943, 947 (Mo.App. 1970), and the jury could certainly so find. Moreover, as Murphy had been working on the press for the first time and for less than two hours at the time of his injuries, the jury could also find that under those circumstances, the punch press without proper guarding was unreasonably dangerous. *Higgins, supra* at 947. However, these questions, which lead to the feasibility of L & J providing proper guarding, were transformed into a question of “*who had the duty to guard?*” through L & J's introduction of the ANSI and OSHA materials into evidence, statements concerning those materials during closing argument by L & J's counsel and the perusal of the materials by the jury during its deliberations.

³ *Restatement of Torts 2d* § 402A, Comment (f) provides: The rule stated in this Section applies to any person engaged in the business of selling products for use or consumption. It therefore applies to any manufacturer of such a product . . .

These actions constitute reversible error and require that the case be remanded to the District Court for a new trial.

L & J claims that the ANSI code and OSHA regulations were offered and admitted for three purposes: (1) to rebut erroneous impressions made on the jury from Murphy's use of 1948 and 1960 ANSI standards; (2) to explain the consensus of opinion supporting the design alternative of leaving the guarding to the purchaser or user; and (3) to demonstrate that L & J was complying with the "government-approved custom of industry" to refute Murphy's allegation that L & J was completely indifferent to or in conscious disregard of the safety of others. In light of the facts as reflected in the record, we find these arguments unpersuasive.

It is clear that Murphy's use of the 1948 and 1960 ANSI codes was to illustrate the availability of point of operation guards at the time the press was manufactured in 1960. He read no section regarding who had the duty to guard, he did not state that L & J's presses were defective for failure to use those guards illustrated in the manual, but directed the jury's attention to the fact that adjustable point of operation guards were available. The use of these standards for this limited purpose is clearly admissible under Rule 402 of the Federal Rules of Evidence, as it relates directly to the feasibility question, i.e., could L & J have feasibly included some form of protective device on the press.

L & J's argument that the ANSI standards and OSHA regulations reflected a consensus of opinion supporting their "design alternative" of leaving the guarding to the purchaser or user must also fail. First of all, it has only the most tenuous, if any, relevance to the question of feasibility. These materials go to who *should* guard rather than whether L & J *could* guard the point of operation. Second, even if arguably relevant, the impact of these materials on the jury is certainly far more prejudicial than

probative and should have been excluded on this ground. Finally, neither the ANSI standards nor the OSHA regulations were in effect at the time the press was manufactured in 1960. Indeed, the ANSI code was not adopted until 1971, while the OSHA regulations were not even in effect at the time Murphy's injuries were sustained.

L & J's final argument, that it was trying to demonstrate compliance with the government-approved industry custom is likewise without merit. This claim relates directly to the "consensus of opinion" issue discussed above and is unpersuasive for the same reasons.

The prejudice against Murphy's case was multiplied during closing argument when counsel for L & J stated:

I'm going to lay right here on the table *my evidence* [the ANSI and OSHA materials] of who—who *has the responsibility of guarding at the point of operation*. (emphasis supplied.)

Although L & J contends that the following statement, "Just because this book says so don't mean you have to find that way" eliminated any problem the "my evidence" sentence might have created, we are not of that opinion, because shortly thereafter, counsel for L & J went on to argue that Congress passed a law stating employers shall provide point of operation guards and that the power of the United States Government and the United States District Courts were now behind the ANSI code in the form of The Occupational Safety and Health Act. Murphy's objections to the "my evidence" statement as well as to the "United States Government" statement were both overruled.

L & J contends that the following instruction given during closing argument:

I'll sustain the objection and I will tell Mr. Igoe, and in the event Mr. Amelung might do likewise, I will instruct

the jury on the law and the jury will listen to those instructions, and what the lawyers say, in any event, is merely argument.

as well as this closing instruction:

Opening statements and closing arguments of the attorneys are intended to help you in understanding the evidence and applying the law, but they are not evidence.

have corrected any errors. In view of the highly prejudicial and erroneous statements of L & J's counsel, we find these instructions inadequate.

Counsel first led the jury down a blind alley by stating that the ANSI and OSHA materials were "[his] evidence of . . . who has the duty to guard." This injected a false issue of fact into the proceedings, i.e., who *should* guard as opposed to *could* L & J guard. *White v. Gallion*, 532 S.W.2d 769 (Mo. App. 1976); *Will v. Gilliam*, 439 S.W.2d 498 (Mo. 1969). Moreover, Congress obviously did not pass the OSHA regulation pertaining to employers providing protective guarding on presses, as counsel led the jury to believe, but passed the Act by which OSHA was authorized to promulgate such regulations. The United States District Court has nothing to do with OSHA enforcement proceedings—they come to the United States Court of Appeals for review from the Occupational Safety and Health Review Commission. Finally, we note that the trial court's instructions both during oral argument and in closing did nothing to rectify L & J's argument that the ANSI and OSHA materials were "[L & J's] evidence of . . . who has the duty to guard."

As a final blow to Murphy's case, the trial court allowed, over Murphy's objection, a jury request for the ANSI code and OSHA regulations. The jury had been out for several hours before asking for these materials, but shortly after gaining access to them, returned a verdict for L & J. We find it

somewhat more than coincidental that a verdict was reached so quickly after receiving these materials. In light of all that has been discussed above, we are of the view that the jury was unduly influenced by these materials.

IV

In reversing this case and remanding for a new trial, it might be well for us to point out that we are not, in effect or in spirit, directing a verdict for Murphy. We make no findings pertaining to the punch press as manufactured insofar as whether it is free of defects or defective, whether it is unreasonably dangerous or not.

What we do find is that the introduction of the ANSI code and OSHA regulations so seriously altered the course of the trial that the central issue of "feasibility" was lost and the improper issue of "who had the duty to guard" was tried. All that we expect on remand is that Murphy have the opportunity to fairly and impartially present his case, that L & J be awarded the same opportunity and that the issues remain clear.

Reversed and Remanded.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B

**United States Court of Appeals
For the Eighth Circuit**

David Radford Murphy,
Plaintiff-Appellant,
vs.
L & J Press Corporation,
Defendant-Appellee.

Cause No.:
76-1092

AFFIDVAT OF OLIVE L. POOLE

Comes now Olive L. Poole, and on her oath states:

1. I am official Court reporter for Division 4 of the United States District Court, Eastern District of Missouri and I was present and recorded stenographically all testimony and proceedings in the cause known as David Radford Murphy v. L & J Press Corporation, cause number 74-834 C (4).
2. Following conclusion of the trial in the United States District Court I was requested by Vincent Igoe, attorney for plaintiff, Murphy, to prepare a complete transcript of proceedings in the case of Murphy v. L & J Press Corporation.
3. At the time I received the order for the transcript I accepted a deposit toward payment of my fees.
4. I transcribed my notes and completed the transcript of proceedings which constituted 1,193 pages.
5. I delivered the original copy of the transcript to Igoe & Igoe and informed them that a balance was still owed on my fees for preparation of the transcript.

6. I contacted the offices of Igoe & Igoe at least twice to remind them that my fees were not paid.
7. I never filed the Court's copy of the transcript of proceedings with the U.S. District Clerk because my fees were not paid by Igoe & Igoe.
8. Counsel for defendant, James J. Amelung, ordered a copy of the transcript, paid for his copy and a complete copy was delivered to him.
9. To the best of my knowledge no part of the transcript was filed with the U.S. District Clerk nor with the United States Court of Appeals, Eighth Circuit.

/s/ Olive L. Poole—Court reporter

State of Missouri
City of St. Louis }ss.

Before me, a notary public, appeared Olive L. Poole, and in my presence, she placed her signature on this affidavit, having first sworn that the information contained therein was true and correct to the best of her knowledge and belief. Act performed 6-22-77.

/s/ Robert A. Wulff, Notary Public

Commissioned within and for the County of St. Louis, Missouri which adjoins City of St. Louis, where this act was performed. My commission expires: June 16, 1980.

APPENDIX C

COVER SHEET AND INDEX FROM "DESIGNATED RECORD" PRODUCED FROM JUDICIAL CHAMBERS

United States Court of Appeals
for the
Eighth Circuit

David Radford Murphy,
Plaintiff-Appellant,
vs.
L & J Press Corp.,
Defendant-Appellee.

865/4 Paid
File No. 76-1092

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APPENDIX D

**In the United States Court of Appeals
For the Eighth Circuit**

David Radford Murphy,
Plaintiff-Appellant,
vs.
L & J Press Corporation,
Defendant-Appellee. } Cause No. 76-1092.

**MOTION OF APPELLEE TO WITHDRAW OPINION
AND DISMISS APPEAL**

Comes now Appellee L & J Press Corporation and, having now discovered that the Court of Appeals heard and decided this case without the benefit of the substantial portion of the trial transcript designated as a part of the records, and having now discovered that the failure of the Court of Appeals to receive these portions of the transcript was a direct result of Appellant's violation of Appellant's duties under Rule 10 (b), Federal Rules of Appellate Procedure, now moves the Court to withdraw its opinion filed June 16, 1977 and to dismiss the Appeal under Rule 13, Rules of the United States Court of Appeals for the Eighth Circuit. For its motion Appellee states:

1. As demonstrated by the affidavit of court reporter, Olive L. Poole, filed with the Court and marked "Appellee's Exhibit 1", Counsel for Plaintiff-Appellant ordered from the Court reporter a complete copy of the transcript in this case.

2. As demonstrated by the minute entries of this Court, on February 23, 1976 this Court entered its order allowing Appeal on designated records pursuant to Local Rule 11.

3. As demonstrated by the minute entries of this Court, appellant sought and obtained *six* separate extensions of time for filing brief and designation of records excusing appellant's delay on the grounds that the transcript of trial proceedings had not as yet been prepared.

4. As demonstrated by the minute entries of this Court, on October 15th the parties were granted permission to file designation of record ten days after the filing of briefs for Appellees.

5. As demonstrated by the minutes of the United States District Court, a certified copy of which has been filed with this Court, on September 24, 1976 Appellants filed their document entitled "Issues to be Presented on Appeal and Records Needed in Support Thereof."

6. As demonstrated by the minutes of the United States District Court, certified copy of which has been filed, on January 12, 1977 Defendant-Appellee filed his designation of record on appeal including therein designation of substantial portions of the trial transcript, and a copy of Appellee's designation of record was included in the materials forwarded by the U.S. District Clerk to the Court of Appeals.

7. As demonstrated by the minutes of the United States District Court, a certified copy of which has been filed, on January 18, 1977 the U.S. District Clerk forwarded to the United States Court of Appeals "Original documents paged and indexed in triplicate, along with depositions."

8. As demonstrated by the minutes of this Court, on January 21, 1977 those documents were accepted and filed as desig-

nated records, the minute entry reading "received original and two copies designated records; depositions of Mathias and Kemp."

9. As demonstrated by the affidavit of Court reporter Olive L. Poole (attached hereto and marked Appellee's Exhibit 1), the transcript of trial proceedings was never filed with the U.S. District Clerk because Counsel for Appellants failed to pay the reporter the balance due on her fees.

10. Pursuant to Rule 10, Federal Rules of Appellate Procedure, Counsel for Appellant was responsible for the filing of the transcript with the U.S. District Clerk, having ordered a complete copy, and Counsel for Appellant was further bound by the provision of the Rule which states "at the time of ordering, a party must make satisfactory arrangements with the reporter for payment of the cost of the transcript."

11. Counsel for Appellee, relying upon the minute entry of this Court dated January 21, 1977, argued and submitted this Appeal believing that the Court would have the benefit of the substantial portions of the transcript designated by Appellees as a part of the record pursuant to Local Rule 11, and pursuant to Rule 30 (b), Federal Rules of Appellate Procedure.

12. Appellee was denied a fair hearing and was denied consideration by this Court of the portion of the records designated by Appellee, and in this situation Appellee has been denied its right to due process as a direct result of the disregard by Counsel for Appellants of his duty under the Federal Rules of Appellate Procedure.

13. Pursuant to Local Rule 13 and pursuant to the Rules of Appellate Procedure, this Court is impowered to dismiss the Appeal.

Wherefore, Appellee prays for an order of the Court withdrawing its opinion entered June 16, 1977 and dismissing the

Appeal for failure of Appellant to comply with Rule 10, Federal Rules of Appellate Procedure.

/s/ JAMES J. AMELUNG
JAMES J. AMELUNG
AMELUNG, WULFF & WILLENBROCK

/s/ STEPHEN D. HOYNE
STEPHEN D. HOYNE
AMELUNG, WULFF & WILLENBROCK

16th Floor International Building
722 Chestnut Street
St. Louis, Missouri 63101
436-6757

Copy of the foregoing sent by postpaid mail to Vincent M. Igoe, Igoe and Igoe, Suite 800, 722 Chestnut Street, St. Louis, Missouri 63101 and Ray E. White, Jr., 7733 Forsyth Boulevard, Suite 950, Clayton, Missouri 63105, this 28th day of June, 1977. A copy also sent to Ralph Kleinschmit, Co-Counsel for Defendant-Appellee, 314 North Broadway, St. Louis, Missouri 63102.

APPENDIX E

In the United States Court of Appeals
For the Eighth Circuit

David Radford Murphy,
Plaintiff-Appellant,
vs.
L & J Press Corporation,
Defendant-Appellee. } Cause No. 76-1092.

**MOTION OF APPELLEE FOR A REHEARING OR
TRANSFER TO THE COURT EN BANC, OR ALTERNATIVE
MOTION TO MODIFY OPINION TO CONFORM TO
THE DESIGNATED RECORD ON APPEAL**

**Appellee's Motion for a Rehearing or Transfer
to the Court En Banc**

Comes now the Appellee and for grounds for rehearing or transfer to the En Banc states:

1. The Court erroneously and prejudicially violated its own rules by deciding this Appeal without the designated portions of the transcript.

2. Appellee was deprived in its constitutional right to a fair and impartial hearing on this appeal when the Court ruled without the designated portions of the transcript.

3. Appellee was denied its constitutional right to due process in this Appeal when the Court ruled without the designated Record on Appeal.

4. The issues in this extended trial and complicated appeal were such that due process required a Record on Appeal along with a designated transcript, for a fair and impartial decision from this Court.

5. The Court by its minute entries misled appellee into the false belief that the designated record on appeal had been filed; thereby causing appellee to incorrectly assume that the designated record would be before the Three Judge Panel hearing this case.

6. The Court misled Appellee further by refusing, neglecting and omitting to inform Appellee that the Appeal was being decided without the designated Record on Appeal.

7. This Court further prejudiced the opinion by failing, omitting and refusing to inform Counsel for Appellee at time of oral argument that the designated Record on Appeal had not yet been filed, contrary to the Courts own minute entry stating that it was in fact filed.

8. That at no time prior to the filing of its opinion did this Court inform Appellee that the Appeal was being decided without the designated Record on Appeal.

9. At no time prior to the June 16, 1977 filing of this Court's opinion did Appellee learn that the designated Record on Appeal had not been filed, and Appellee learned only then as a result of its effort to try to learn why the Court's opinion could be so contrary to the designated Record on Appeal, which Appellee assumed was spread before the Court.

10. The Court's opinion fails to discuss the age of the press, the year of manufacturing, the state of the art at the time of manufacture, and fails to discuss the evidence that distinguishes the feasibility of guarding a multifunctional and unifunctional press. A fair review of these issues could not be had without the designated Record on Appeal.

11. It is error and pure non-judicious folly for the Court in its opinion to state (Page Two): "We have carefully reviewed each of the claims and agree with Murphy that the case must be reversed and remanded . . ." when the designated Record on Appeal was essential to a careful review of each of the points raised by Appellant.

12. The Court ignored the issue of a directed verdict and the issue of contributory fault on the part of plaintiff as a matter of law in spite of the Courts own observation (Page Three): "(t)estimony indicates he was aware his hand could be severed if it was caught under the ram". If the Court had read the Record then a favorable ruling would have been made in favor of Appellee on these issues on the Appeal.

13. The Court in its opinion (Page Four) makes mention of the fact that Appellee agrees "that proper guarding would insure complete safety . . ." and yet the Court neglects to put this statement in the context of Appellee's laborious efforts throughout the entire trial to show that each multifunctional operation of this multifunctional press must be considered as a separate guarding problem and since there is no limit to the number of dies that could be made for this press then the jury could consider the impossibility of the manufacturer to "properly guard" so as to "insure complete safety" and that such safety (100 percent safety) being the desired attainable safety, can only be determined *after* the selection by the user of a die design and method of feeding. Failure of the Court to recognize this legal position of Appellee resulted in the prejudicial misunderstanding by the Court as to why "the universal custom of the punch press industry has been to rely solely upon the purchaser and user of the machine to supply the guarding either by making his own guards, hiring another company to make the guards or purchase pre-fabricated guards from other sources." (Page Four) A reading of the record could have permitted the Court to avoid the prejudicial rulings based upon Appellees Concessions of fact.

14. The Court's opinion (Page Four and Eight) finding that plaintiff's expert called the jury's attention to point of operation guards illustrated in the 1948 and 1960 ANSI B-11 Codes completely ignores the devastating cross-examination of that expert resulting in the piece-by-piece demonstration to the jury that there is *no* universal guard (Transcript 206-681) and further setting the stage for Appellee's experts (Dudley and Reed) to testify that an inadequate guarding system is a "booby trap". The statement by the Court referred to above as well as the Court's statement at the top of Page Nine relative to the feasibility questions indicates that the Court did not have a grasp of the issues presented by the plaintiff's introduction of the 1948 and 1960 ANSI Codes and the Court should have had the designated Record on Appeal to completely inform itself of the evidence on this point. At this point it is extremely important and crucial to emphasize the error of the Court in failing to obtain and read and understand the opening statements of plaintiff and defendant. The learned trial judge had a firm grasp of the case and a clear understanding of the issues before the testimony began. If this Court had read the opening statements which were included in the Appellee's designation of the Record then this Court would not have misunderstood the so called "concession" made by Appellee.

15. The Court erroneously condemns the use of the words "responsibility of guarding" (Page Five) when a reading of the entire record and an understanding of the issues tried to this jury causes no doubt that the learned trial judge and the jury and the plaintiff knew that Appellee was attempting to prove to the satisfaction of the jury that "100 percent feasibility of guarding" was attainable at the site of use of this press and the placing of an inadequate guard on the machine at the time of manufacture would be an act of *irresponsibility*. At the point referred to by the Court on Page Five of its opinion the argument of Counsel for Appellee referring to "responsibility of guarding" is synonymous with the word "feasibility" as with the

words "feasibility of guarding" and both expressions would mean the same thing to this jury and to the trial judge and to the plaintiff and to all of the parties knowledgeable in the case and who were in a position to review the term "responsibility of guarding" in the light of all of the evidence presented to the jury and that such term was used in connection with Appellee's contention that 100 percent Safety cannot be achieved by the manufacturer but can be attained only by the user and thus the feasibility (responsibility) of reaching that goal of 100 percent safety lies with the user. This Court had only to read the opening statements of Appellee to know that the jury was told at the very outset that "feasibility" was the issue. The jury knew this. The Court knew it. The plaintiff knew it. The failure of this Court to read the Record caused this Court to miss the point of Appellee's defense that it was not feasible to attach responsibility on the manufacturer in this case. It is in this context that the word "responsibility" was used and this Court erred in not reading the designated Record on Appeal to inform itself as to the trial positions of the parties and to ascertain that the Trial Court fully understood the issues and correctly conducted the trial of those issues to the jury. If this Court had read the Record the Court would have understood Appellee's theory of the case and would have avoided the erroneous condemnation of Appellee's argument.

16. The Court observed (Page Six) that the jury returned a verdict shortly after receiving copies of the ANSI and OSHA materials and speculates as to the reasons why the jury wanted this material. No where does this Court observe that during the trial Counsel for Plaintiff had intimated to the jury that the 1948 and 1960 ANSI Code *did not* require the employer to guard the point of operation of the punch press. This intimation was put forth in the direct testimony of plaintiff's expert witness Joseph Movshin, which the Court on Appeal did not read. The attempt of plaintiff to erroneously mislead the jury was met by defendant (Appellee) through its expert (Dudley) who told

the jury that he was familiar with the ANSI Standards, having worked on the committees writing the standards and presently acting as Chairman of the 1971 ANSI B 11 Committee and thereafter told the jury that it was always the position of the ANSI standards (including the 1948 and 1960 Codes) that the employer should guard the point of operation and this was specifically spelled out in subsequent ANSI B 11 Codes and in the current 1971 B11-1 Code as well as the OSHA Standard on the subjects. The jury could just as easily have wanted to check the credibility of Counsel for Plaintiff and there was no prejudicial error shown in letting the jury see with their own eyes what had been read to them during the trial and in permitting them to decide on this trial issue involving the credibility of the requirements of the ANSI Codes and the erroneous opinion of this Court is further compounded when this Court failed to observe, note, or give attention to the numerous offers of the Trial Court during the trial to allow Counsel for Plaintiff to offer appropriate instructions limiting the role of the ANSI or OSHA Standards in this case.

17. The Court erroneously ruled (Page Eight) that admission of the ANSI and OSHA Standards were reversible error when there was an issue of punitive damages in the case. The state of the art; the issue of feasibility; the opinions of the experts in the Punch Press Industry comprising the experts who drafted all the ANSI and OSHA Standards, past and present, all were admissible to permit the jury to fairly consider the issue of punitive damages if plaintiff had obtained a verdict. What plaintiff could have used as a sword the defendant should be able to use as a shield. A reading of the Record on Appeal would have made it obvious to the Court that the plaintiff's claim for punitive damages pervaded the entire trial and was an integral part of the decision of the trial Court to allow evidence of the net worth of defendant.

18. The Court erroneously decided (Page Eight, Twelve) that the issue of feasibility was transformed into the question of

who had the duty to guard. The failure of this Court to read the designated transcript and especially the opening statements results in the failure of this Court to possess the understanding that the jury possessed as to the issues in the case and the purpose of the ANSI and OSHA Standards and results in an erroneously reversal for a new trial.

19. The Court's opinion (Page Eight) erroneously attempts to summarize the motives for Appellee's use of the ANSI and OSHA Standards when a complete understanding of the issues and the evidence should have caused the Court to conclude that the first and primary and admissible reason for the use of the ANSI and OSHA Standards was to demonstrate that all of the knowledgeable people in the Punch Press Industry agree that *only* the user or employer can achieve 100 percent safety with guarding at the point of operation. The failure of the Court to recognize that there was no evidence of a universal guard that would be 100 percent effective on this multifunctional press leads the Court to the immaterial conclusion that "adjustable point of operation guards were available". (Page Eight)

20. The Court erroneously failed to recognize the probative value of the ANSI and OSHA Standards. (Page Nine)

21. For the Court to observe that the 1971 ANSI Code and the OSHA Regulations "were not even in effect at the time Murphy's injuries were sustained" (Page Nine) fails to recognize the proposition that post occurrence studies and research could very well be utilized to support prior acts. The Court also erred in declaring "highly prejudicial" (Page Ten) the statements of Counsel for Appellee in closing argument relative to the ANSI and OSHA evidence and finding the quoted instructions inadequate (Page Ten) when at the same time the Court in its opinion ignores, or did not inform itself with a designated Record on Appeal, that the Trial Court had offered Counsel for Plaintiff an opportunity to submit clarifying instructions but plaintiff declined.

22. The Court erroneously declared certain closing argument comments of Counsel "highly prejudicial" (Page Ten) when the Court failed to read the designated Record on Appeal that would have permitted it to understand the case in the context the words were intended to convey. A reading of Appellee's opening statement alone would have avoided this erroneously finding by the Court in its opinion. The same applies to the erroneously comment by the Court (Page Ten) that Counsel first led the jury down a blind alley by stating that the ANSI and OSHA materials were "(his) evidence of . . . who had the duty to guard." The Court again erred in failing to understand the context the words were intended to convey.

23. The Court erroneously concluded (Page Eleven) that the jury was "unduly influenced" by the ANSI and OSHA materials when such materials were proper for the jury to consider under all of the other evidence and issues in the case and any possibility of undue influence could have been corrected by an instruction which plaintiff refused to request.

24. The Court in concluding its opinion (Page Twelve) remands for plaintiff and defendant to have a fair and impartial presentation of their case and yet the failure of the Court to utilize a designated Record on Appeal of this lengthy trial and complicated Appeal belies its own mandate and compels a rehearing with the proper availability of a designated Record on Appeal or transfer to the Court En Banc.

Wherefore the premises considered the Appellee moves the Court for a rehearing or for transfer to the Court En Banc.

Alternative Motion of Appellee to Modify Opinion to Conform to the Designated Record on Appeal

Comes now Appellee and moves the Court to Modify its Opinion to Conform to the Designated Record on Appeal and for grounds states:

1. The Court should obtain the Record on Appeal and the designated transcript and after review of same modify its present opinion to conform to the Record by affirming the jury verdict.
2. The Court should find contributory fault on the part of plaintiff as a matter of law and affirm the jury verdict.
3. The Court should find that plaintiff did not make a submissible case and should affirm the jury verdict.
4. The Court should modify its opinion and state that its decision was reached and an opinion filed without having a designated Record on Appeal.
5. The Court should modify its opinion by disclosing in the opinion that the Appellee had every reason to believe that this Court would use the designated Record on Appeal but that Appellee was not informed of the absence of a designated Record of Appeal and was allowed to argue the case without being told that a designated Record on Appeal was not filed even though the minutes of this Court indicate that the designated Record on Appeal was filed.

Wherefore the premises considered the Appellee moves the Court to modify its opinion on the grounds aforesaid.

JAMES J. AMELUNG
AMELUNG, WULFF & WILLENBROCK
STEPHEN D. HOYNE
AMELUNG, WULFF & WILLENBROCK
Attorneys for Defendant-Appellee
16th Floor International Building
722 Chestnut Street
St. Louis, Missouri 63101
436-6757

A copy of the foregoing motion sent by postpaid mail to Vincent M. Igoe, Igoe and Igoe, Suite 800, 722 Chestnut Street, St. Louis, Missouri, 63101 and Ray E. White, Jr., 7733 Forsyth, Suite 950, Clayton, Missouri 63105, this 28th day of June, 1977. Copy also sent to Ralph Kleinschmit, Co-Counsel for Defendant-Appellee, 314 North Broadway, St. Louis, Missouri 63102.

APPENDIX F

United States Court of Appeals for the Eighth Circuit

76-1092

September Term, 1976

David Radford Murphy,
Appellant,
vs.
L & J Press Corporation,
Appellee.

Appeal from the United
States District Court for
the Eastern District of
Missouri.

Appellee's motion to withdraw opinion and dismiss this appeal has been considered by the court and is denied in all respects.

August 1, 1977

APPENDIX G

United States Court of Appeals for the Eighth Circuit

Robert C. Tucker, Clerk

St. Louis, Mo. 63101

August 11, 1977

Mr. Vincent M. Igoe
Igoe & Igoe
Suite 800—722 Chestnut St.
St. Louis, Mo. 63101

Mr. Leonard P. Cervantes
800 Intl. Bldg.
722 Chestnut St.
St. Louis, Mo. 63101

Messrs. James J. Amelung
& Stephen D. Hoyne
Amelung, Wulff &
Willenbrock
722 Chestnut St.
St. Louis, Mo. 63101

Mr. Ralph C. Kleinschmidt
Boatmen's Bank Bldg.
314 N. Broadway
St. Louis, Mo. 63102

Re: No. 76-1092. David Radford Murphy v.
L & J Press Corp.

Dear Sirs:

The mandate of this Court in the above case is being issued today and sent to the Clerk of the United States District Court at St. Louis, Mo.

Very truly yours,
ROBERT C. TUCKER,
Clerk

eh

P. S. When the necessary costs bills are received from counsel for appellant, we will enter an appropriate order taxing costs in favor of appellant in the above case.

APPENDIX H

United States Court of Appeals for the Eighth Circuit

76-1092

September Term, 1976

David Radford Murphy,
Appellant,
vs.
L & J Press Corporation,
Appellee. } Appeal from the United
States District Court for
the Eastern District of
Missouri.

The Court having considered petition for rehearing en banc filed by counsel for appellee and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

August 15, 1977

APPENDIX I

United States District Court, Eastern District of
Missouri, Eastern Division

David Radford Murphy, Plaintiff,
v.
L & J Press Corporation, Defendant. } No. 74-834 C (3)

MEMORANDUM AND ORDER

(Filed Oct. 25, 1977)

This matter is before the Court upon defendant's objections to plaintiff's bill of costs. Defendant also seeks to strike the same. On August 12, 1977, the Court of Appeals for the Eighth Circuit reversed the judgment herein and remanded this cause for a new trial. On August 18, 1977, the Court ordered that defendant pay the following costs of plaintiff:

Clerks docketing fee	\$ 50.00
Costs of printing appellant's brief and reply brief	\$ 91.44

On September 8, 1977, plaintiff submitted a bill of costs which included the following:

Fees of the court reporter for all or any part of the transcript necessarily obtained for use in the case	\$1,873.00
Fees and disbursements for printing	\$ 99.38
Costs as shown on Mandate of Court of Appeals	\$ 141.44
Appeals Bond	\$ 20.00

The record herein indicates that the court reporter was not paid for the costs of the transcript at any time prior to the decision of the Court of Appeals. Said decision was rendered without benefit of a transcript. Thus, this Court is unable to conclude that the fees of the court reporter were for the transcript "necessarily obtained for use in the case". Plaintiff has failed to provide support for the costs listed for fees and disbursements for printing. If said costs were incurred in the printing of the appellate briefs, such costs are already included in the costs awarded pursuant to the mandate of the Court of Appeals. Similarly, plaintiff has failed to support the claimed cost of \$20.00 for an appeals bond.

Additionally, the Court notes that Rule X, Rules of the United States District Court for the Eastern Judicial District of Missouri, provides:

Within ten days after entry of a final judgment or decree, the party recovering costs *shall* file in the office of the Clerk of this court a verified bill of costs . . . [emphasis added].

Thus, the bill of costs filed herein was untimely. *Cf., Dickinson Supply Incorporated v. Montana-Dakota Utilities Co.*, 423 F.2d 106 (8th Cir. 1970).

Accordingly, the Court concludes that only those costs mandated by the Court of Appeals may be recovered herein.

Therefore,

IT IS HEREBY ORDERED that defendant's objections to plaintiff's bill of costs be and are sustained and that plaintiff shall file an amended bill of costs in accordance with this memorandum within seven (7) days of this date.

IT IS FURTHER ORDERED that defendant's motion to strike be and is denied.

/s/ JOHN F. NANGLE
United States District Judge

Dated: October 25, 1977.

Supreme Court, U. S.
FILED

DEC 7 1977

MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-662

L & J. PRESS CORPORATION,
Petitioner,

VS.

DAVID RADFORD MURPHY

and

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT,
Respondents.

RESPONDENT'S BRIEF

**In Opposition to Petition for Writ of Certiorari and
Alternative Petition for Writ of Mandamus**

ROBERT R. SANDCORK
RAY E. WHITE, JR.
7733 Forsyth, Suite 950
Clayton, Missouri 63105
(314) 726-2525

and

VINCENT M. IGUE
IGUE, IGUE & CERVANTES
722 Chestnut Street, Suite 800
St. Louis, Missouri 63101
(314) 231-8177

Attorneys for Respondent David
Radford Murphy

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-662

L. & J. PRESS CORPORATION,
Petitioner,

vs.

DAVID RADFORD MURPHY
and
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT,
Respondents.

RESPONDENT'S BRIEF

**In Opposition to Petition for Writ of Certiorari and
Alternative Petition for Writ of Mandamus**

**ADDITIONAL STATUTES AND RULES RELATING
TO CONTROVERSY**

28 U.S.C. § 753(b)

(b) One of the reporters appointed for each such court shall attend at each session of the court and at every other proceeding designated by rule or order of the court or by one of the judges,

and shall record verbatim by shorthand or by mechanical means which may be augmented by electronic sound recording subject to regulations promulgated by the Judicial Conference: (1) all proceedings in criminal cases had in open court; (2) all proceedings in other cases had in open court unless the parties with the approval of the judge shall agree specifically to the contrary; and (3) such other proceedings as a judge of the court may direct or as may be required by rule or order of court or as may be requested by any party to the proceeding. The Judicial Conference shall prescribe the types of electronic sound recording means which may be used by the reporters.

The reporter shall attach his official certificate to the original shorthand notes or other original records so taken and promptly file them with the clerk who shall preserve them in the public records of the court for not less than ten years. An electronic sound recording of proceedings on arraignment, plea, and sentence in a criminal case, when properly certified by the court reporter, shall be admissible evidence to establish the record of that part of the proceeding.

The reporter shall transcribe and certify all arraignments, pleas, and proceedings in connection with the imposition of sentence in criminal cases unless they have been recorded by electronic sound recording as provided in this subsection and the original records so taken have been certified by him and filed with the clerk as hereinabove provided in this subsection. He shall also transcribe and certify such other parts of the record of proceedings as may be required by rule or order of court. Upon the request of any party to any proceeding which has been so recorded who has agreed to pay the fee therefor, or of a judge of the court, the reporter shall promptly transcribe the original records of the requested parts of the proceedings and attach to the transcript his official certificate, and deliver the same to the party or judge making the request.

The reporter shall promptly deliver to the clerk for the records of the court a certified copy of any transcript so made.

The transcript in any case certified by the reporter shall be deemed prima facie a correct statement of the testimony taken and proceedings had. No transcripts of the proceedings of the court shall be considered as official except those made from the records taken by the reporter.

The original notes or other original records and the copy of the transcript in the office of the clerk shall be open during office hours to inspection by any person without charge.

28 U.S.C. § 753 (f)

(f) Each reporter may charge and collect fees for transcripts requested by the parties, including the United States, at rates prescribed by the court subject to the approval of the Judicial Conference. He shall not charge a fee for any copy of a transcript delivered to the clerk for the records of court. Fees for transcripts furnished in criminal proceedings to persons proceeding under the Criminal Justice Act (18 U.S.C. 3006A), or in habeas corpus proceedings to persons allowed to sue, defend, or appeal in forma pauperis, shall be paid by the United States out of money appropriated for that purpose. Fees for transcripts furnished in proceedings brought under section 2255 of this title to persons permitted to sue or appeal in forma pauperis shall be paid by the United States out of money appropriated for that purpose if the trial judge or a circuit judge certifies that the suit or appeal is not frivolous and that the transcript is needed to decide the issue presented by the suit or appeal. Fees for transcripts furnished in other proceedings to persons permitted to appeal in forma pauperis shall also be paid by the United States if the trial judge or a circuit judge certifies that the appeal is not frivolous (but presents a substantial question). The re-

porter may require any party requesting a transcript to prepay the estimated fee in advance except as to transcripts that are to be paid for by the United States.

Rule 11 (a) and (b), Federal Rules of Appellate Procedure
Transmission of the Record

(a) Time for Transmission; Duty of Appellant. The record on appeal, including the transcript and exhibits necessary for the determination of the appeal, shall be transmitted to the court of appeals within 40 days after the filing of the notice of appeal unless the time is shortened or extended by an order entered under subdivision (d) of this rule. After filing the notice of appeal the appellant shall comply with the provisions of Rule 10(b) and shall take any other action necessary to enable the clerk to assemble and transmit the record. If more than one appeal is taken, each appellant shall comply with the provisions of Rule 10(b) and this subdivision, and a single record shall be transmitted within 40 days after the filing of the final notice of appeal.

(b) Duty of Clerk to Transmit the Record. When the record is complete for purposes of the appeal, the clerk of the district court shall transmit it to the clerk of the court of appeals. The clerk of the district court shall number the documents comprising the record and shall transmit with the record a list of the documents correspondingly numbered and identified with reasonable definiteness. Documents of unusual bulk or weight and physical exhibits other than documents shall not be transmitted by the clerk unless he is directed to do so by a party or by the clerk of the court of appeals. A party must make advance arrangements with the clerks for the transportation and receipt of exhibits of unusual bulk or weight.

Transmission of the record is effected when the clerk of the district court mails or otherwise forwards the record to the

clerk of the court of appeals. The clerk of the district court shall indicate, by endorsement on the face of the record or otherwise, the date upon which it is transmitted to the court of appeals.

CORRECTION OF QUESTIONS PRESENTED

Petitioner's Questions Presented 1 and 4 assume a fact which is untrue as shown by the record to-wit: that appellant's counsel failed to make satisfactory arrangements with the court reporter for payment of the cost of the transcript.

Rather in both Questions Presented 1 and 4 the first four lines should be restated to read: "Where the court reporter failed to file a certified copy of the transcript with the clerk of the district court as required by 28 U. S. C. § 753 which failure resulted in the absence. . . ."

CORRECTED STATEMENT OF CASE

Fairness would have required petitioners to have included Respondent's Reply to petitioners past-opinion motions in the Court of Appeals together with the attached affidavits as part of the Appendix to its Petition here. Because such was not done, Respondent has inserted these pleadings as an Appendix to this Brief. (Respondent's Appendix 1, 2, 3, RA 1-A-1-A-7).

A complete transcript was not ordered even though originally demanded by Petitioner-Defendant. After a conference with the Appeals Expeditor of United States Court of Appeals for the Eighth Circuit, Counsel agreed that certain portions of the testimony were not essential to the issues on appeal. These portions of the testimony ordered were as set forth the Plaintiff's issues to be presented on appeal and record needed in support thereof which was filed within the designated time. While it is

true that it was necessary to obtain six extensions of time for filing appellant's brief since the transcript was not completed in a timely manner, portions were delivered from time to time as completed and the court reporter always said the delay was due to the press of other court work and never expressed dissatisfaction with the arrangements for payment.

The arrangements with the court reporter for payment of the transcript were an initial payment of \$1,500.00 made by plaintiff-appellant, respondent here, and additional sums as necessary upon request of the reporter. As set forth in the Affidavit of Ray E. White, Jr. (Respondent's Appendix 2, RA-A-4) and Vincent M. Igoe (Respondent's Appendix 3, RA-A-6) filed in the United States Court of Appeals for the Eighth Circuit, no written bills for such additional transcript costs could be found and none can be recalled. Not even in the affidavit of the Court Reporter (Appendix B, A-12) does she claim to have informed counsel that unless the rest of the transcript cost (which turned out to be \$373.00 of a total bill of \$1,873.00) was not paid at once she would not complete or file the transcript. Rather, she delivered the original of the transcript to the parties and informed plaintiff's counsel, through her agent, that the official copy was being filed with the District Court.

Respondent's counsel did not check with either the district court or court of appeals to verify that this was done but instead relied on the requirements of the procedural statutes and docket entries that the transcript had been filed and transmitted. It came as a complete surprise to Respondent's counsel that these official acts had not been performed.

ARGUMENT

I. Defendant-Petitioner Has Not Been Prejudiced by the Absence of the Full Record.

While counsel has always been given to understand that appellate courts read transcripts, even one as lengthy as the one here, there is no requirement that a court do so. Even after the absence of the transcript was brought to the attention of the United States Court of Appeals for the Eighth Circuit by the Motion of Appellee To Withdraw Opinion and Dismiss Appeal (Appendix D, A-16) and Motion of Appellee for a Rehearing (Appendix E, A-20) raising the same question now raised, the court felt it unnecessary to reconsider (Appendix F, A-30; Appendix H, A-32).

Plaintiff-Appellant had fully briefed seven points on appeal but the opinion, reversing and remanding for a new trial, was based solely on the first of these, that "who had the duty to guard at the point of operation" as between the manufacturer and plaintiff's employer had been made a jury issue rather than the correct issue of whether it was feasible for the manufacturer to have provided a guard. There really was no disagreement as to what factually had taken place at trial, though as would be expected, counsel differed as to the legal correctness and the meaning to be attached to the exact words used at trial. Both appellant and appellee had the transcript, quoted liberally from it and there was no substantive disagreement on the facts. It is therefore not surprising that the appellate court found it unnecessary to examine the transcript to determine what the parties agreed had transpired at the trial.

II. The Transcript Was Not Available to the Appellate Court Because of the Actions of the Court Reporter in Not Filing a Certified Copy With the District Court as Required by Statute and the Actions of the District Court in Not Transmitting the Designated Portion of the Record to the Court of Appeals.

The fault, if any, here lies with the court reporter and clerk of the district court rather than plaintiff-appellant, respondent here. 28 U.S.C. §753 provides:

(a) . . . Upon the request of any party to any proceeding which has been so recorded who has agreed to pay the fees therefor, . . . the reporter shall promptly transcribe the original records of the requested parts of the proceedings and attach to the transcript his official certificate, and deliver the same to the party or judge making the request.

The reporter shall promptly deliver to the clerk for the records of the court a certified copy of any transcript so made . . .

(f) Each reporter may charge and collect fees for transcripts requested by the parties, including the United States at rates prescribed by the court subject to the approval of the Judicial Conference. He shall not charge a fee for any copy of a transcript delivered to the clerk for the records of court . . . The reporter may require any party requesting a transcript to prepay the estimated fee in advance . . .

The court reporter, according to her own affidavit (Appendix B, A-12), violated the requirement of 28 U.S.C. §753 (a) in failing to deliver a copy of the completed transcript to the clerk of the district court. She apparently would excuse this violation of statute by an assertion that the balance of her fees had not been paid. But she does not dispute the fact that when the transcript was ordered, Igoe & Igoe had agreed to pay her fees therefor and that she had requested and received \$1,500.00 in

advance which assumingly was her estimate of the fee. While there is certainly a factual dispute as to whether she ever submitted a bill for the \$373.00 balance, now paid, this is irrelevant. She had a clear duty to file the transcript with the clerk of the district court. Her actions have now caused the unnecessary expenditure of thousands of dollars worth of judicial and legal time and has further congested the court dockets at the district, appellate and now in the Supreme Court of the United States all over her unjustified fear she might not be paid \$373.00, complicated by apparently sloppy billing procedures.

The reporter's unauthorized action in refusing to file the transcript was compounded and concealed when the clerk of the district court, purportedly acting pursuant to Rule 11 (a) and (b) and Rule 30 (f), Federal Rules of Appellate Procedure and Rule 11, A. (2), Rules of the United States Court of Appeals for the Eighth Circuit transmitted the original record without having it completed by the filing of the transcript and in apparently failing to make the two copies required under Rule 11, A. (2). Such actions were not only contrary to the court rules but also contrary to the Designation of Record filed by both parties to the appeal. One can but hope that these actions were merely mistakes inadvertently made and not part of a deliberate effort to impede the appellate process.

CONCLUSION

For the foregoing reasons, respondent, David Radford Murphy, respectfully prays that the Court deny the writ of certiorari and the alternative writ of mandamus sought by petitioner.

ROBERT R. SANDCORK

RAY E. WHITE, JR.
7733 Forsyth Boulevard, Suite 950
Clayton, Missouri 63105
726-2525

and

VINCENT M. IGOE
IGOE, IGOE and CERVANTES
722 Chestnut Street, Suite 800
St. Louis, Missouri 63101
231-8177

Attorneys for Respondent
David Radford Murphy

APPENDIX

RESPONDENT'S APPENDIX 1

In the United States Court of Appeals
For the Eighth Circuit

David Radford Murphy,
Plaintiff-Appellant,
vs.
L & J Press Corporation,
Defendant-Appellee.

Cause No. 76-1092

**Reply of Plaintiff-Appellant to Motion of Appellee to Withdraw
Opinion and Dismiss Appeal, Motion of Appellee for Re-
hearing or Transfer to the Court En Banc, or Alternative
Motion to Modify Opinion to Conform to the Designated
Record on Appeal**

Comes now plaintiff-appellant and in reply to defendant-appellee's Motions states:

1. Plaintiff-appellant has been informed for the first time by defendant's present motions that there was any failure on the part of the Court Reporter to file the transcript with the District Court or any failure on the part of the Clerk of the District Court to transmit the portions of the record designated by the respective parties to this court or for these materials to be available to the Judges hearing this matter. In this respect the Court Reporter, Deputy Clerk of the United States District Court, Appeals Expediter, Clerk of this Court and the Judges sitting in this matter, led plaintiff's counsel to believe that the transcript had been filed with the District Court and transmitted to this Court in Compliance with Rules 10 and 11 F.R.A.P. and Local Rule 11.
2. Affidavits of Ray E. White, Jr. and Vincent M. Igoe are attached hereto in support of plaintiff's position.

3. Defendant is incorrect in stating that a complete trial transcript was ordered but instead, after conference of counsel with the Appeals Expediter it was agreed that a partial transcript, omitting entirely the testimony of certain witnesses would suffice in spite of defendant's counsel's original position that a full transcript was necessary. Plaintiff designated the portion of the transcript agreed upon in accordance with Rule 10(b), F.R.A.P.

4. The portions of the transcript agreed upon as necessary were promptly ordered by plaintiff and, pursuant to Rule 10(b), F.R.A.P. plaintiff made satisfactory arrangements with the Court Reporter for payment, to wit \$1,500.00 which was paid at the time the transcript was ordered with the understanding that if the cost exceeded this amount additional sums would be paid. While it is possible that additional sums are owed the Court Reporter, which plaintiff is quite willing to pay, plaintiff's counsel is unaware of any request for additional sums although it is possible routine written bills were submitted with various portions of the transcript which was transmitted to plaintiff's counsel from time to time in six volumes but after diligent search counsel is unable to locate any such bills.

5. Plaintiff and Plaintiff's counsel were never informed by the Court Reporter that she intended to or did withhold the transcript and refuse to file it with the District Court but was led to believe by the Court Reporter that the original copy of the transcript was promptly filed with the District Court when completed since the Court Reporter's messenger who delivered the final volume, informed plaintiff's counsel that he was proceeding immediately thereafter to the District Court to file the original.

6. Plaintiff's counsel was led to believe, in the same manner as defendant's counsel, that the transcript had been transmitted as part of the designated record by the District Court to this Court.

7. All extensions of time to file the transcript and briefs were necessitated, as the Appeals Expediter is well aware, by the contention of the Court Reporter that she had been occupied with other duties and had not had time to finish the transcript and at no time was it communicated to plaintiff's counsel that any of this delay was caused by any lack of payment of the Court Reporter nor, in fact, does the Court Reporter so claim in her affidavit.

8. No request was ever made by the Court for the transcript except a request, following oral argument, for two refused instructions which were promptly obtained by counsel for both parties and hand carried to the court within a few minutes.

9. Plaintiff-Appellant can find no rule of court which requires the court to read the transcript and, if the same was actually not available, the late Mr. Justice Clark apparently did feel the necessity of referring to it.

10. Other matters raised by defendant in its motion for rehearing were fully considered by the court and amount to little more than an attempt to claim that defendant was entitled to a directed verdict when this court's opinion reversed the district court because of the improper use of ANSI and OSHA to transfer the duty to guard from the manufacturer to the user of the press.

RAY E. WHITE, JR.
7733 Forsyth, Suite 950
Clayton, Missouri 63105
726-2525

VINCENT M. IGOE
IGOE and IGOE
722 Chestnut, Suite 800
St. Louis, Missouri 63101
231-8177

Attorneys for Plaintiff-Appellant

RESPONDENT'S APPENDIX 2

State of Missouri }
County of St. Louis }^{ss.}

In the United States Court of Appeals
For the Eighth Circuit

David Radford Murphy,
Plaintiff-Appellant,
vs.
L & J Press Corporation,
Defendant-Appellee.

Cause No. 76-1092

Affidavit of Ray E. White, Jr.

Comes now Ray E. White, Jr., and first being duly sworn upon his oath states:

1. I ordered those portions of the transcript agreed upon by opposing counsel as necessary from the Court Reporter, Olive L. Poole.
2. I received from Olive L. Poole her request for \$1,500.00 advance payment for the transcript, relayed said request to Vincent M. Igoe, and ascertained that said payment was in fact paid her.
3. If the cost of the transcript exceeded \$1,500.00 she was to bill Igoe and Igoe for said amounts.
4. In numerous conversations with Olive L. Poole concerning delays in the preparation of the transcript by her, she never mentioned to me that any additional amount was owed or

unpaid or that she would not file the transcript, when completed, if any amounts then due were unpaid.

5. I never received any additional bill for the transcript.
6. I was led to believe, when I received the sixth and last volume of the transcript, that the original had been filed by Olive L. Poole with the District Court.
7. No one ever said anything that would have indicated that said transcript was not filed or had not been transmitted to this Court but I was informed for the first time on July 8, 1977 through defendant's motions that said acts had not taken place.

RAY E. WHITE, JR.

Subscribed and sworn to before me this 8th day of July, 1977.

RICHARD L. MURRAY
Notary Public

My Commission Expires: 3-1-80.

RESPONDENT'S APPENDIX 3

State of Missouri }
City of St. Louis }
ss.

In the United States Court of Appeals
for the Eighth Circuit

David Radford Murphy,
Plaintiff-Appellant,
vs.
L & J Press Corporation,
Defendant-Appellee. }
Cause No. 76-1092

Affidavit of Vincent M. Igoe

Comes now Vincent M. Igoe and first being duly sworn
upon his oath states:

1. I caused a check for \$1,500.00 to be paid to Olive L. Poole for the preparation of the transcript in this case.
2. I have no recollection of ever receiving an invoice or a written or verbal demand for payment of any additional sums for the preparation of the transcript in this case.
3. I stand ready to pay any additional sums which may be owed but have searched the records of my office and can find no invoice or statement regarding such sums.
4. When the messenger delivered the final volume of the transcript on behalf of Olive L. Poole, he made no demand for payment, presented no invoice of which I was aware but stated

that he was going directly thereafter to the District Court to file the original of the transcript.

VINCENT M. IGUE

Subscribed and sworn to before me this 9th day of July, 1977.

RAY E. WHITE, JR.
(Seal) Notary Public

My Commission Expires: March 24, 1978